

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

STATE OF WASHINGTON, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
STATE, et al.,

Defendants.

No. 2:18-cv-01115-RSL

PUBLIC DEFENDANTS' OPPOSITION TO
STATES' MOTION TO COMPEL
PRODUCTION OF ADMINISTRATIVE
RECORD IN ACCORDANCE WITH 5
U.S.C. § 706

Plaintiffs make a salacious allegation: the Trump Administration “revers[ed]” the State Department’s “longstanding position regarding dissemination on the internet of the computer files” for improper reasons. Motion to Compel at 2. They demand the production of the complete administrative record to demonstrate the government’s rationales were “arbitrary” and “capricious.” Motion to Compel at 1. The truth is far more innocuous, and indeed a bit mundane.

Over the past six years, the Obama and Trump Administrations have engaged in a sophisticated and detailed plan to transfer certain firearms and associated technical data from the export jurisdiction of the State Department to the export jurisdiction of the Commerce Department. And, in May 2018, the State Department announced its plan to amend ITAR to that effect. That shift placed the Department of Justice in an odd position.

1 Defense Distributed, the Second Amendment Foundation, and Conn Williamson (the
2 “Public Defendants”) had challenged the constitutionality of the State Department’s regime.
3 Once the transition was completed, the Public Defendants, and only the Public Defendants,
4 would still be subject to the old regulations. The federal government would have lost that case
5 had it advanced such an irrational argument in court.

6 Moreover, since 1978, the Justice Department has continuously advised the State
7 Department that applying the International Traffic in Arms Regulations (“ITAR”) to public
8 speech violates the First Amendment. Reasonably, the Plaintiffs and Defendants reached a
9 settlement agreement. The reason for the settlement is that simple.

10 The State Department press briefing on the Settlement Agreement, attached to the Rupert
11 Declaration in States’ Motion to Compel as Exhibit A, comports with this simple explanation for
12 the settlement:

13 The Department of Justice was advising the State Department on this entire legal
14 matter. The Department of Justice suggested that the State Department and the
15 U.S. Government settle this case, and so that is what was done. We were informed
16 that we would’ve lost this case in court, or would have likely lost this case in
court based on First Amendment grounds. We took the advice of the Department
of Justice, and here we are right now.

17 The Public Defendants oppose the Plaintiffs’ Motion to Compel Production of
18 Administrative Record because the entire basis for this suit is frivolous. The case can be entirely
19 resolved based on publicly-available records. However, to the extent this Court is willing to
20 entertain an expansion of the record, this Court should also consider the exhibits attached to this
21 motion. These documents demonstrate how banal this proposed rulemaking is, and rebut the
22 salacious charge that the federal government has acted in an arbitrary and capricious fashion.

1 **I. Since 1978, the Department of Justice Has Opined That Applying ITAR to Public**
2 **Speech Would Violate the First Amendment.**

3 Since 1978, the Department of Justice has advised the State Department that imposing a
4 prior restraint on public speech under the ITAR would violate the First Amendment. This Court
5 should consider the following legal opinions:

6 **A. 1978 Department of Justice letter to the White House.** Exhibit A at note 7.

7 “It is by no means clear from the language or legislative history of either statute
8 that Congress intended that the President regulate noncommercial dissemination
9 of information, or considered the problems such regulation would engender.”

10 **B. 1981 Department of Justice letter to the State Department.** Exhibit B at 1.

11 “However, insofar as [the ITAR] could be applied to persons who have no
12 connection with any foreign enterprise, who disseminate technical data in
13 circumstances in which there is no more than a belief or a reasonable basis for
14 believing that the data might be taken abroad by foreign nationals and used there
15 in the manufacture of arms, the licensing requirement is presumptively
16 unconstitutional as a prior restraint on speech protected by the First Amendment.”

17 **C. 1984 Department of Justice letter to the State Department.** Exhibit C at 14.

18 “We remain of the opinion, however, that on their face, the ITAR still present
19 some areas of potentially unconstitutional application, and, moreover, that we
20 cannot be certain whether existing case law would be sufficient to narrow the
21 range of application to a constitutionally sufficient extent.”

22 **D. 1997 Department of Justice Report to Congress.** Exhibit D at 24.

23 “Anyone who teaches or publishes bombmaking information -- including those
24 who do so for wholly legitimate reasons, such as explosives manufacturers, the
25 military, and encyclopedia publishers -- could foresee that some unknown
26 recipient of the teaching or information will use it for unlawful ends; but the First
Amendment would not permit culpability on that basis.”

These four legal opinions were emailed to certain State Department officials named in the
Public Defendants’ case against the State Department. *See* Exhibit E. The record in that case,
which gave rise to the settlement that is under attack in this Court, also includes these legal
opinions. *See Defense Distributed et al. v. U.S. Department of State, et al*, No. 15-cv-372 (W.D.
Tex.) (Dkt. #8. App. 99-196).

1 **II. Notices Published in the Federal Register Provide Ample Support for the State**
2 **Department's Actions.**

3 The temporary modification under ITAR Section 126.2 allowing public speech on
4 firearms is only valid while the final rule to remove the firearms from the USML is in
5 development. This State Department action, as well as the license to the Public Defendants, is
6 premised on the final rule eventually removing the firearms. As such, the administrative record
7 necessarily includes the following records relating to the proposed removal that were published
8 in the Federal Register:

9 **A. Drafts, minutes of meetings, and any other records of review and interagency**
10 **consultations for 83 Fed. Reg. 24,166 (May 24, 2018).**

11 “The changes described in this proposed rule and in the State Department’s
12 companion proposed rule on Categories I, II, and III of the USML are based on a
review of those categories by the Department of Defense, which worked with the
Departments of State and Commerce in preparing the amendments.”

13 **B. Drafts, minutes of meetings, and any other records of review and interagency**
14 **consultations for 83 Fed. Reg. 24,198 (May 24, 2018).**

15 “Although the Department is of the opinion that this proposed rule is exempt from
16 the rulemaking provisions of the APA and without prejudice to its determination
17 that controlling the import and export of defense services is a foreign affairs
function, the Department is publishing this proposed rule with a 45-day provision
for public comment.”

18 **C. Over 3,000 public comments received by the State Department in response to the**
19 **proposed rule. See summary at Exhibit F.**

20 **III. Popular Press Stories Illustrate That State Department's Plan Began During the**
21 **Obama Administration.**

22 The Plaintiffs express shock that the Trump Administration “revers[ed]” the State
23 Department’s “longstanding position regarding dissemination on the internet of the computer
24 files.” However, a basic Google search would dispel the notion that this rulemaking was sudden.
25 Popular press stories reveal that the proposals for the list-transfer stretch back to the Obama
26 Administration.

1 **A. 2012 Wall Street Journal, Article, “White House Efforts to Relax Gun Exports**
2 **Face Resistance.”** Exhibit G.¹

3 “An Obama administration official said the rules were a work in progress and
4 concerns raised by government agencies were ‘being addressed.’”

5 “Under the proposed rules, close-assault weapons, sniper rifles, combat shotguns
6 and ammunition would be moved from the ‘strict controls’ of the Munitions List
7 to a ‘lesser controlled’ Commerce list. According to a Homeland Security memo.”

8 **B. 2015 Washington Trade and Tariff Newsletter, “Administration Ready to Move**
9 **on USML Categories I, II, III.”** Exhibit H.

10 “After more than a two-year delay, the Obama administration reportedly is ready
11 to try again to propose transfer regulations for U.S. Munitions List (USML)
12 Categories I (firearms), II (guns and armament) and III (ammunition). The
13 decision to go forward with proposals to revamp the three categories and move
14 some products to the Commerce Control List (CCL) was reportedly made at an
15 interagency meeting the week of April 20 [2015].”

16 The Public Defendants do not expect that the administrative record will include any
17 Congressional notifications for the proposed list transfers because no Congressional notification
18 requirement applies until the time of a final rule.²

19 **IV. Conclusion**

20 The complete record in this case demonstrates that the State Department’s actions here
21 are part of a long-term, mundane plan that began during the Obama administration. Moreover,
22 the complete record shows that the Department of Justice has long advised the State Department
23 that its export control regime violates the First Amendment. There is no reason to supplement the
24 record further. Every day this case is prolonged, the Public Defendants—and all Americans—are
25 unable to exercise their constitutional rights. The record provided by publicly-available
26 information is enough to deny the injunctive relief that the Plaintiffs seek.

27 ¹ See www.wsj.com/articles/SB10001424052702304868004577378421787264242

28 ² See e.g., “Federal Court Incorrectly Says DDTC Jumped the Gun on Gun Printing Plans,”
29 Clif Burns, Bryan Cave LLP, available at www.exportlawblog.com/archives/9218, Exhibit I.

1 DATED this 9th day of August, 2018.

2 SNELL & WILMER LLP

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20 Second Amendment Foundation, Inc., and
21 Conn Williamson
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1 **CERTIFICATE OF SERVICE**

2 I certify that on August 9, 2018, I served the foregoing by filing it with the Court's
3 CM/ECF system, which automatically notifies all counsel of record.

4
5 I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of
6 America that the foregoing is true and correct.

7 DATED this August 9, 2018.

8 SNELL & WILMER LLP

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